

SOVEREIGN IMMUNITY

571

partment feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

"It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations."

XXVI *Bulletin*, Department of State, No. 678, June 23, 1952, pp. 984-985.

The American Law Institute Restatement adopts a restrictive approach with respect to sovereign immunity to proceedings arising out of commercial activities. Section 69 of the Restatement, together with the Institute's "Caveat" and "Comment" thereon, read:

Amer. L.
Institute,
1965

"The immunity of a foreign state under the rule stated in § 65 does not apply to a proceeding arising out of commercial activity outside its territory. Property whose primary use is connected with such activity may be attached for the purpose of initiating such a proceeding and may be subject to further measures of enforcement where it is determined that the claimant is entitled to the property.

"Caveat:

"The Institute expresses no opinion as to whether property of a foreign state connected with a commercial activity of the state may be subjected to execution in satisfaction of a judgment otherwise than as stated in this Section.

"Comment:

a. Standard for determining commercial activity. In considering what is commercial activity, the standard to be applied is that of the state exercising jurisdiction. The courts of some states adopt the criterion of the nature of the transaction itself and, as a result, would consider the purchase by a foreign state of goods such as boots as a commercial transaction. The courts of other states would inquire into the purpose of the transaction and hold that the purchase of boots for the use of an army is not a commercial activity.

"In determining whether to exercise jurisdiction, a state must not apply its own standard in an unreasonable manner, and treat as commercial an activity generally considered governmental, such as the sailing of a warship in an organized navy. A state could, however, under the rule stated in this Section, treat

STAT